

**United States Department of Labor
Employees' Compensation Appeals Board**

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L.I., Appellant)	
)	
and)	Docket No. 23-0471
)	Issued: December 26, 2023
U.S. POSTAL SERVICE, BAYSIDE POST OFFICE, Brooklyn, NY, Employer)	
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Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

On February 17, 2023 appellant, through counsel, filed a timely appeal from a February 1, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).² The Clerk of the Appellate Boards assigned the appeal Docket No. 23-0471.

On June 2, 2022 appellant, then a 41-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day he dislocated his right shoulder and injured his right hip and foot when his right foot got stuck in a hole causing him to fall down, while in the performance of duty.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The Board notes that, following the February 1, 2023 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

By development letter dated June 9, 2022, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP afforded both parties 30 days to respond.

In a June 9, 2022 response, the employing establishment controverted the claim and alleged that it obtained a video recording from a nearby business which showed that appellant fell to the ground on the left side of his body, then repositioned himself with his right shoulder on the ground until a supervisor arrived at the scene. It also noted that a text message with a co-worker revealed that prior to his injury, appellant inquired about continuation of pay (COP) and disability insurance. The employing establishment provided photographs; however, a copy of the video recording was not provided.

By decision dated July 11, 2022, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the June 2, 2022 employment incident occurred as alleged. It noted that he had not responded to its development letter and concluded that the requirements had not been met to establish an injury as defined by FECA.

On July 12, 2022 appellant requested reconsideration.

OWCP received appellant's response to its development questionnaire relating that his right foot got stuck in a hole in the concrete which caused him to fall. Appellant related that he felt his right shoulder pop, causing severe pain, and when emergency services moved him onto a stretcher, he felt his shoulder pop back in. He noted that he had no symptoms prior to his injury and had undergone a prior shoulder surgery in 1999. Appellant indicated that his fall was legitimate, he took his relay bag out and when he placed it on the ground his foot became stuck in a hole in the concrete. He explained that prior to his fall, he had inquired about disability insurance because his wife had asked about it after a supervisor had recently died at the age of 43. Appellant also noted that a couple of coworkers had disability insurance, and he wanted to know which insurance company they used. He related that he had contacted his supervisor immediately after his fall.

In an October 21, 2022 agency response, V.P., from the employing establishment, noted that the video recording on file showed that the incident did not occur in the manner alleged by appellant. V.P. explained that the video recording showed that appellant positioned himself on the ground and did not trip and fall as alleged.

By letter dated October 27, 2022, counsel requested a copy of the video recording for review.

By decision dated February 1, 2023, OWCP denied modification of the prior decision.

The Board, having duly considered this matter, finds that the case is not in posture for decision.

As noted above, the employing establishment indicated that it had possession of a video recording from a nearby business which showed that appellant fell to the ground on the left side of his body, then repositioned himself with his right shoulder on the ground until a supervisor arrived at the scene. However, while the employing establishment provided photographs, a copy

of the video recording was not provided. The employing establishment should provide any relevant information that is normally in its exclusive control.³ OWCP must, therefore, further develop this factual aspect of the case before a full and fair determination can be made regarding whether the June 2, 2022 employment incident occurred as alleged.⁴

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.⁵ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.⁶

On remand, OWCP shall obtain the video recording from the employing establishment and provide a copy to counsel. Following this and other such development deemed necessary, OWCP shall issue a *de novo* decision.

IT IS HEREBY ORDERED THAT the February 1, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: December 26, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

³ See *S.B.*, Docket No. 22-1346 (issued June 1, 2023).

⁴ See *id.*; *S.N.*, Docket No. 21-0258 (issued October 19, 2021); see also *J.V.*, Docket No. 17-0973 (issued July 19, 2018).

⁵ *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

⁶ *C.L.*, Docket No. 20-1631 (issued December 8, 2021); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).